Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petition for Certiorari Filed August 20, 1975, Certiorari Granted October 20, 1975

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DOCKET ENTRIES

DATE	
7-16-74	Filed Complaint. Issued Summons.
7-17-74	Filed order that Fred Berman of 701 Seventh Avenue, is designated to serve the summons and complaint in the above-entitled action, Clerk.
7-25-74	Filed pltff's affdvt. of Ira Jay Sands and notice of motion for an order for class determination. Ret. 8-6-74.
7-25-74	Filed pltff's memorandum of law in support of motion pursuant to Rule 23, FRCP.
7-30-74	Filed stip & order extending deft. Touche Ross & Co.'s time to answer to 9-4-74. So ordered — Cannella, J.
8-2-74	Filed deft. Touche, Ross & Co.'s notice of taking deposition of pltff on 8-13-74.
8-2-74	Filed deft. Touche, Ross & Co.'s interrogs., first set.
8-5-74	Filed stip and order extending deft. Teleprompter Corp.'s time to answer from 8-4-74 to 9-4-74. So ordered—Cannella, J.

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8-5-74	Filed stip and order that pltff's motion for class determination presently retnble on 8-6-74 is adjourned to 9-6-74. So ordered—Cannella, J.
7-25-74	Filed summons and affdvts. of service of Fred Berman of summons and complaint on defts. T. Ross & Co. on 7-17-74, Teleprompter Corp. on 7-17-74 — B.D. Fishman & C. Luckman both on 7-17-74.
8-13-74	Filed affdvt. of Fred Berman dated 7-17-74 of copy of summons and complaint of Barry Simon.
8-13-74	Filed pltff's notice of taking deposition of deft. Barry P. Simon, etc. on 8-19-74.
8-13-74	Filed pltff's notice to produce documents.
8-15-74	Filed pltff's notice of taking depositions of the named defts. on the dates indicated.
8-15-74	Filed affdvt. of service of Fred Berman of summons & complaint on Marvyn Carton on 7-17-74.
8-19-74	Filed deft. Touche Ross & Co.'s affdvt. of Lawrence R. Eno and notice of motion for an order staying the depositions of all defts. by

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	pltff, including the deposition of deft. Touche Ross & Co., etc., as indicated. Ret. 9-3-74.
8-20-74	Filed deft. The First National Bank of Boston affdvt. of Philip A. Shaver and notice of motion for an order to dismiss as against said deft. Ret. 8-29-74.
8-20-74	Filed memorandum of law in support of the motion of deft. The First National Bank of Boston to dismiss.
8-20-74	Filed pltff's notice of taking deposition of Marvyn Carton on 8-24-74.
8-26-74	Filed pltff's affdvt. of Ira Jay Sands and notice of motion for an order directing the manner in which certain defts. in this action are to be served with the summons and complaint. Ret. 9-4-74.
8-28-74	Filed affdvt. of service of Fred Berman of a copy of the summons and complaint with Barry Simon on 7-17-74 and by service of mail to: Hubert J. Schafly Hugh E. Flaherty Allen E. Puckett John H. Richardson

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9-3-74	Filed deft. Teleprompter Corp.'s affdvt. and show cause order to dismiss complaint and for protective order with a stay. Ret. 9-10-74 at 10:00 a.m. Conner, J.
9-3-74	Filed Memorandum of deft. Teleprompter Corp. in support of motions to dismiss complaint and for protective order and application for stay of discovery.
9-3-74	Filed deft. Touche Ross & Co.'s answering affdvt. of Lawrence R. Eno.
9-3-74	Filed stip & order extending the time for deft. Hubert J. Schafly to answer to 9-24-74. So ordered—Cannella, J.
9-3-74	Filed stip and order-that deft. The First National Bank of Boston's motion to dismiss retnble on 8-29-74 is adjourned to 9-13-74. So ordered—Cannella, J.
9-4-74	Filed memo endorsed on motion filed 8-26-74. Motion denied without prejudice to renewal upon proper papers, pltff having failed to comply with General Rule 9 of this court. So ordered—Cannella, J. (m/n)
9-4-74	Filed Summons and return — served the following:

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First National Bank of Boston by H. James Williams, Jr. on 7-29-74
Raymond P. Shafer on 8-19-74
Jack Wrather by Pamela Smith on 8-8-74

9-5-74	Filed deft. Touche Ross & Co.'s notice of motion for an order, pursuant to Rules 12 (b) and 9 (b) FRCP, dismissing the complaint. Ret. 9-16-74.
9-5-74	Filed memorandum of deft. Touche Ross & Co. in support of motion to dismiss complaint.
9-5-74	Filed affdvt. of Lawrence R. Eno on behalf of deft. Touche Ross & Co. on the motion to dismiss the complaint by deft. Teleprompter Corp.
9-5-74	Filed deft. Touche Ross & Co.'s supplemental answering affdvt. of Lawrence R. Eno on pltff's class action motion.
9-5-74	Filed deft. Teleprompter Corp. affdvt. of Edwin J. Buckingham III in response to pltff's motion for class action determination.
9-9-74	Filed stip & order that all discovery of deft. First National Bank of Boston is adjd until 10 days after date of entry of an order determining the motion of First National to dismiss—Cannella, J.

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9-11-74	Filed response and objections of deft. Touche Ross & Co. to pltff's Notice to produce documents.
9-12-74	Filed Affidavit & Notice of Motion by deft. Hubert J. Schafly for an order dismissing the complaint for failure to state a claim upon which relief can be granted etc. as indicated rtble before Cannella, J. on 9-20-74.
9-12-74	Filed memo in support of motion to dismiss.
9-12-74	Filed Endorsement & order that the within order of Conner, J. is hereby modified and amended so as to stay all discovery by pltff until deft. Teleprompter Corp.'s motion to dismiss the complaint herein is heard and determined. Cannella, J.
9-13-74	Filed Notice of Appearance and Demand that defts. Allen E. Puckett and John H. Richardson hereby appear in this action and that the firm of Milbank, Tweed, Hadley, & McCloy appear as attys for same, and that all papers etc. be served on them.
9-12-74	Filed Endorsement & Order: Pltff's application for the entry of a default judgment is denied against deft. Barry P. Simon. The

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	Court exercises its discretion to renewal at such time as pltff has shown a meritorious basis for this law suit. Application denied without prejudice, Cannella, J. M/N.
9-13-74	Filed stip & order that the date on which defts. Allen E. Puckett & John H. Richardson must answer, etc., is extended to 9-20-74.
9-16-74	Filed stip & order that and agreed by and between counsel, that the return date of all motions now pending before the Court is extended to 9-20-74, in chambers, Cannella, J.
9-19-74	Filed deft's (Marvyn Carton) Notice of Joinder in motion to dismiss the complaint.
9-19-74	Filed pltff's affdvt in opposition to motion of First National Bank of Boston to dismiss.
9-19-74	Filed pltff's memorandum of law in opposition to the motion by deft. to dismiss.
9-20-74	Filed Reply Memorandum of deft. the First National Bank of Boston, in support of its motion to dismiss.
9-23-74	Filed affdvt. of Ira Jay Sands in opposition to motion to dismiss the complaint by deft.'s Touche, Ross & Co., Teleprompter Corp. and H. J. Schafly.

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9-23-74	Filed memorandum of law of pltff in opposition to motions to dismiss.
9-23-74	Filed notice of motion of deft.'s Puckett and Richardson for an order dismissing the complaint. Ret. 9-30-74.
9-23-74	Filed memo of deft.'s Puckett and Richardson in support of above motion.
9-20-74	Filed stip and Order that the return date of various motions pending before the Court (Teleprompter Corp.) are adjourned to 9-20-74. Cannella, J.
9-20-74	Filed stip and order that the return date of various motions now pending etc. (deft. First National Bank of Boston), are adjourned to 9-20-74. Cannella, J.
9-20-74	Filed Affidavit of Service, by Steven L. Kroleski.
9-20-74	Filed Pltff's response to Interrogs.
9-24-74	Filed pltff's notice of motion for order directing service summons and complaint. Ret. 9-25-74.
9-24-74	Filed pltff's memorandum in support of above motion.

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9-24-74	Filed additional affdvt in opposition by pltff to motion to dismiss by First National Bank of Boston.
9-25-74	Filed reply memo in support of motion of deft. H.J. Schafly to dismiss complaint.
9-26-74	Filed notice of reassignment to Judge MacMahon.
9-25-74	Filed Stip & Order that reply papers on deft. Touche Ross's motion to dismiss the complaint be served by 10-7-74.
10-1-74	Filed deft (Puckett & Richardsons') affdvt in opposition to pltff's class action motion.
10-3-74	Filed pltff's affidavit in opposition to Defts. Puckett & Richardson's motion to dismiss the complaint as to them
10-3-74	Filed Memo of Law of Pltff in opposition to motions by defts. to dismiss.
10-3-74	Filed pltff's response to defts. interrogs.
10-4-74	Filed deft. (Touche Ross) reply affdvit. on motion to dismiss.
10-4-74	Filed deft. (Touche Ross) reply memo in support of motion to dismiss the complaint.

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10-7-74	Filed deft (Touche) affdvt & notice of motion compelling pltff to respond to interrogs dated 8-24-74. Ret. 10-11-74.
10-7-74	Filed defts memo of law in support of motion to compel answers.
10-9-74	Filed defts (Shafer & Wrather) affdvt in support of motion to dismiss the complaint.
10-22-74	Filed Memo-Endorsed on motion of 8-20-74. Deft. First National Bank of Boston's motion to dismiss action on ground of improper venue is granted. So Ordered, MacMahon, J. m/n
11-15-74	Filed Pltff's Notice of Appeal to USCA from an Order dated 10-21-74 dismissing this action against deft. First National Bank. Notice Mailed 11-19-74 to: Debevoise, Plimpton, Lyons & Gates of 299 Park Avenue, New York City.
11-19-74	Filed Memo-End on back of motion filed 9-5-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on deft. Touche Ross & Co.'s filed 8-19-74. Motion withdrawn

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	at pre-trial conference held on 10-4-74. So ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on Pltff's motion filed 9-24-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft.'s Puckett & Richardson, filed 9-23-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.
11-19-74	Filed Memo Endorsed on Pltff's motion filed 7-25-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft. Hubert J. Schafly motion filed 9-12-74. Motion withdrawn at pre-trial conference held on 10-4-74. So Ordered, MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft. Marvyn Carton motion filed 9-19-74. Motion withdrawn at pre-trial conference held on 10-4-74. So Ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft. Touche Ross & Co., motion filed 10-7-74. Motion

withdrawn at pre-trial conference held on 10-4-74. So Ordered—MacMahon, J.

11-19-74 Filed Order of Consolidation of 73 Civ 3929, 73 Civ 4109, 73 Civ 4133, 73 Civ 4895, 74 Civ 3025 (74 Civ 3281 for pre-trial purposes only) & 74 Civ 4341. See 73 Civ 3929 for entry of order. m/n

12-16-74 Filed notice that original record on appeal has been certified and transmitted to the USCA.

5-23-75 Court of Appeals affirmed in open court.

COMPLAINT

(Filed July 16, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINSTON, JACK WRATHER and FIRST NATIONAL BANK OF BOSTON,

Defendants.

74 Civ. 3025

Plaintiff, for his complaint, by his attorneys, GAINSBURG, GOTTLIEB, LEVITAN & COLE and IRA JAY SANDS, alleges that:

1. This action arises under the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*, common law, and the laws of New

York State (all collectively called the "act"). This court has jurisdiction pursuant to Section 27 of the Exchange Act, and pendent jurisdiction.

2. Defendants have engaged, are now engaged, and are about to engage in acts and practices which constitute and will constitute violations of the Act, and will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and acts and practices of similar purport and object.

3. The acts and practices constituting the violations alleged herein occurred within the Southern District of New York and elsewhere.

4. Teleprompter Corporation ("Teleprompter") is a New York corporation with corporate offices at 50 West 44th Street, New York, New York. At all times herein, Teleprompter was an issuer of common stock, registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. 781, and traded on the New York Stock Exchange.

5. Touche, Ross & Co. ("Touche") were the independent auditors for Teleprompter and certified its financial statements hereinafter alleged.

6. First National Bank of Boston ("Boston Bank") is a national banking institution which was related to the violations herein as hereinafter set forth.

7. The other defendants are or were officers and/or directors of Teleprompter, and involved in the said violations.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action on behalf of a class herein described pursuant to Rule 23(b) (3) Fed.R.Civ.P.

9. The class consists of all persons who purchased common stock of Teleprompter Corp. during the period in which the violations complained of were committed. There are thousands of members of the class, located in various parts of the United States. Joinder of all members is impracticable. Plaintiff will fairly and adequately protect interests of the class. His claims are typical of claims of all class members. His interest is to obtain relief for himself and for class for the violations herein alleged.

10. A class action is superior to other available methods for fair and efficient adjudication of the controversy.

11. The violations alleged were perpetrated on the class. Each member has sustained damages, too small to make it feasible to institute individual actions.

12. Multiple actions with burdens on the Courts and defendants and dangers to stockholders that the Statute of Limitations may run before they became aware of their rights, should be avoided.

13. It would be impracticable for all stockholders to intervene as parties in this action.

14. The Southern District of New York is the most convenient forum for litigating all claims herein alleged.

15. Plaintiff anticipates no difficulties in the management by this Court of the class action herein.

16. Questions of fact and law common to the class predominate over questions affecting only individual members.

17. The common questions of fact include the accuracy and materiality of the releases and reports of Teleprompter herein alleged and whether they were concealed from the public. Also whether data disseminated by Teleprompter to the public contained untrue statements of material facts and omitted to state material facts necessary to make the statements therein not misleading.

18. The common question of law includes whether the acts herein violated the Act and whether the defendants are liable to the plaintiff and the class.

19. Since on or about January 1, 1973, defendant Teleprompter, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails has employed devices, schemes and artifices to defraud, has made untrue statements of material facts and has omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, and has engaged in acts, practices and courses of business in connection with the purchase and sale of securities, in violation of the Act.

20. On or about April 1, 1973, defendant Teleprompter filed with the SEC an annual report on Form 10-K including a consolidated balance sheet for the year ended December 31, 1972, distributed such report to its stockholders and disseminated it among the investing public. Such reports state as assets plant, property and equipment at year-end December 31, 1972, valued at $180,362,075, and the same at year-end December 31, 1971, were valued at $113,885,737. Note 1 to the financial statements disclosed that "The Corporation records additions to plant, property and equipment at cost which includes amounts for materials and applicable labor, overhead and interest." Note 5 disclosed that during years ended December 31, 1972 and 1971, respectively, interest aggregating approximately $3.2 million and $1.6 million had been capitalized as a cost of construction.

21. Said report is false and misleading in that it fails to state that capitalized overhead costs included in valuation of plant, property and equipment constituted approximately $17 million, which fact was material in that Teleprompter reasonably should have known that a reduction in its construction program was likely and a substantial amount of such capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings.

22. During 1973, Teleprompter made statements and issued releases and reports regarding anticipated growth of future earnings, its expanded program for contruction of facilities, financial strength based upon a $150 million revolving credit and term loan obtained as of approximately April 26, 1973,

development of new programs, and possibility of external growth through acquisitions.

23. From and after on or about January 1, 1973, Teleprompter's management knew or reasonably should have known that its internal financial controls and procedures were inadequate to provide accurate and timely budgets, results of operations reports, and projections of costs and revenues for its new acquistions and its existing systems.

24. On or prior to June 7, 1974, defendants were aware of potential business problems in that, among other things, the rate of Teleprompter's expenditures would deplete a $150 million line of revolving and term credit obtained as of April 26, 1973 by the first quarter of 1974, whereas it was intended that such credit be sufficient for financing construction programs through December 31, 1974; that Teleprompter had then and in the future would have cash flow problems; that without sufficient funds construction would halt; that the halt in such construction activity, under Teleprompter's then current accounting policies, would adversely affect Teleprompter's earnings; that Teleprompter would be "unprofitable" and might realize a net loss in 1973; and construction should be slowed to preserve available funds. Teleprompter's management was advised shortly thereafter that earnings for the second quarter of 1973 would not be as high as those for the first quarter of 1973.

25. Notwithstanding management's awareness of such problems, and notwithstanding that such problems were under consideration, on or about July 12, 1973, Teleprompter issued a

press release which announced that as a result of an accelerated expansion program second quarter earnings per share were expected to be lower than those of first quarter of 1973, that the company was in the midst of its building years, and that the company planned to take down the remainder of a $150 million bank credit line in 1973 and 1974 to finance its construction and expansion program. Such release was false and misleading in that at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and Teleprompter was experiencing other financial problems.

26. On or about August 6, 1973 Teleprompter issued a press release which re-confirmed that statement in the July 12, 1973 press release that Teleprompter was in the midst of its building years and stated that Teleprompter was now charging a lower percentage of certain expenditures to capital and deferred accounts than theretofore and charging a greater percentage of such items to expenses for the first six months ended June 30, 1973 than was charged in the first quarter of 1973, and, as a result earnings were 6 cents per common and common equivalent share in the second quarter of 1973 as compared with 22 cents per common and common equivalent share in the first quarter of 1973. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would be charged against revenues, adversely affecting future earnings, and Teleprompter was experiencing other financial problems.

27. On a number of occasions between June 7, 1973 and September 4, 1973, officers and directors of Teleprompter received information, engaged in discussions and meetings and made decisions relating to necessity of conserving cash and curtailing Teleprompter's construction program, and relating to the impact that such actions would have upon Teleprompter's financial condition and earnings.

28. At a meeting of the Board of Directors of Teleprompter on or about August 13, 1973, the Board was informed that Teleprompter's operations were at a cash-even basis and as a result, Teleprompter's construction of cable television franchises was being financed by funds obtained under the $150 million bank credit. It has been anticipated that Teleprompter would have a positive cash low. The Board, at such meeting, approved a program designed to attain the budgeted revenue projection for 1973 by increasing the number of subscribers to cable television systems and reducing construction costs by curtailing construction and reviewing the entire construction program to ascertain for which systems construction could be deferred until 1974.

29. On or about August 24, 1973, Todd met with a vice president of the First National Bank of Boston, Teleprompter's agent bank in a $150 million Revolving and Term Credit Agreement dated as of April 26, 1973, at which time cash flow figures, proposed curtailment of the construction program and earnings were discussed.

30. By letter of August 28, 1973 the Bank vice president communicated with Todd in which he noted that the foundation

of the loans was predicated on the cash flow of Teleprompter, and suggested that as a result of the marked difference in cash flow between figures shown him on August 24, 1973, and those originally provided the bank, Teleprompter had a cash flow problem immediately. The Bank's vice president acknowledged certain steps he understood Teleprompter seriously considered implementing as follows: (a) cutting back construction expenditures wherever possible and practical; (b) reducing overhead expenditures; and (c) considering possibility of disposing of assets of subsidiaries which are unprofitable cash users.

31. On or about August 30, 1973, the Bank vice president requested that directors of Teleprompter be polled to determine whether the program, as outlined in the aforementioned letter of August 28, 1973, and as submitted by Todd to the Bank, was authorized by Teleprompter Board of Directors. The proposals contained in the August 28, 1973 letter were unanimously approved by Teleprompter's board of directors as indicated in a letter from the Secretary of Teleprompter confirming such vote by the Teleprompter's board of directors.

32. On or about August 24, 1973, Teleprompter requested from the Bank an advance of $12 million under the Revovling and Term Credit Agreement but delivery of funds was deferred until all of the banks party to the agreement had been informed of the then condition of Teleprompter, of its program to curtail construction and improve its financial condition, and of a possible default by Teleprompter under the lending agreement.

33. On or about September 4, 1973, Teleprompter issued a press release "concerning rumors circulating about adverse corporate developments" in which the company stated:

> "We categorically deny that there are any unannounced adverse developments concerning Teleprompter's business, assets, or earnings.
>
> "Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.
>
> "Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions."

34. Such press release issued on September 4, 1973, was materially false and misleading in that it failed to disclose that Teleprompter was experiencing cash flow problems, that a request for a drawdown of funds under the $150 million agreement had been deferred at the request of the Bank, the impact or estimate of the effect the curtailment in construction would have on future income and earnings, probability that investments in certain cable systems would be written down due

to curtailment of construction, and that increased expenses would be incurred from a new marketing program to obtain new subscribers.

35. Each of the defendants as hereinbefore described, aided and abetted Teleprompter and the other defendants and/or joined and participated in the one continuous course of conduct and plan and scheme to eliminate knowledge of the problems of Teleprompter from the investing public. Each of the defendants actively participated in the violations hereinbefore alleged and adopted by action and by inaction the violations committed by each of the defendants hereto.

36. Defendant, Touche, as independent auditors for Teleprompter, wantonly disregarded its obligation to the public to expeditiously bring to the attention of the SEC and the New York Stock Exchange and the public, the fact that the financial condition and cash available and working capital and cash flow of Teleprompter were such that the financial statements issued by Teleprompter were misleading and omitted material disclosures. With knowledge of such falsity of Teleprompter's financial statements, Touche nevertheless approved such statements, gave the reputation of its name and authority to Teleprompter and to such financial statements, thus causing the public to be misled and resulting in the loss of plaintiff.

37. Defendant, Boston Bank, as afore-described, knew full well of the violations afore-described and failed to bring them to the attention of the SEC and the New York Stock Exchange, and to inform the public thereof, despite the fact that in

performing its function on behalf of and together with Teleprompter, Boston Bank entered into fiduciary obligations to the investing public and particularly to the stockholders of Teleprompter and to the plaintiff.

38. Plaintiff and the members of the class and the investing public were ignorant of the fact that the press releases, financial statements and other reports issued by Teleprompter as aforedescribed, were materially false and misleading in the respects so described. Plaintiff and said other persons traded in the securities of Teleprompter in reliance upon the accuracy, completeness and forthrightness of the statements so distributed by the defendants and were damaged by the said conduct in an amount presumably unknown to the plaintiff.

39. As a result of the actions aforedescribed, defendants have committed a common-law fraud upon the plaintiff and members of the class and have likewise violated the statutes of the State of New York respecting said activities.

40. Said activities of the defendants were committed in a wanton and malicious manner and constituted fraud upon the public generally, and a violation of the business ethics required of such defendants.

WHEREFORE, Plaintiff demands judgment:

1. Determining that this action be maintained as a class action.

2. Determining that plaintiff and the members of the class have judgment against defendants and each of them in amount sufficient to compensate for the damages incurred, with proper interest thereon.

3. Enjoining defendants and any other person acting in active concert or participation with them, in connection with the purchase and sale of Teleprompter securities and any other security, from further acts and practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the SEC thereunder.

4. Granting to plaintiff and members of the class punitive and exemplary damages in the sum of $1 Million.

5. Granting to plaintiff the costs and expenses of this action, including reasonable attorneys and accountants fees.

6. Granting such other and further relief as this Court may deem appropriate.

IRA JAY SANDS
By:

(Sgd.) Ira Sands
Attorney for Plaintiff
Office and Post Office Address

701 Seventh Avenue
New York, New York 10036
(212) 265-3500

AND

SAMUEL GOTTLIEB
GAINSBURG,
GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 697-3440

EXHIBIT — COMPLAINT FOR PERMANENT INJUNCTION ANNEXED TO FOREGOING COMPLAINT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

TELEPROMPTER CORPORATION,

Defendant.

Civil Action No.

The United States Securities and Exchange Commission ("Commission") the plaintiff herein, for its complaint alleges that:

1. This action arises under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a, *et seq.*, and this court has jurisdiction of this action pursuant to Section 27 of the Exchange Act, 15 U.S.C. 78aa.

2. The defendant has engaged, is engaged, and is about to engage in acts and practices which constitute and will constitute violations of Sections 10(b) and 13(a) of the Exchange Act, 15

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

U.S.C. 78j(b) and 78m(a), Rules 10b-5, 12b-20 and 13a-1, 17 CFR 240.10b-5, 240.12b-20 and 240.13a-1, and Rule 3-06 of Regulation S-X, 17 CFR 210.3-06, promulgated thereunder.

3. The defendant will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and acts and practices of similar purport and object.

4. The acts and practices constituting the violations alleged herein have occurred within the jurisdiction of the United States District Court for the Southern District of New York and elsewhere.

5. Pursuant to authority conferred on the Commission by Sections 10(b), 12(b) and 13(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78l(b) and 78m(a)], the Commission has promulgated Rules 10b-5, 12b-20, 13a-1 and Rule 3-06 of Regulation S-X (17 CFR 240.10b-5, 240.12b-20, 240.13a-1 and 17 CFR 240.3-06), such rules and regulations being in effect at all times mentioned herein and at the present time.

6. Teleprompter Corporation ("Teleprompter") is a New York corporation having its corporate offices at 50 West 44th Street, New York, New York. At all times relevant herein Teleprompter was an issuer of common stock, a class of equity security registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. 781, and traded on the New York Stock Exchange, a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act, 15 U.S.C. 78f.

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

CAUSE OF ACTION

[Sections 10(b) and13(a) of the Exchange Act, 15 U.S.C. 78j(b) and 78m(a), and Rules 10b-5, 12b-20 and 13a-1, 17 CFR 240.10b-5, 240.13a-1, 240.12b-20 and Rule 3-06 of Regulation S-X, 17 CFR 210.3-06]

7. Paragraphs 1 through 6 are realleged and incorporated herein by reference.

8. Since on or about January 1, 1973, defendant Teleprompter, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails has employed devices, schemes and artifices to defraud, has made untrue statements of material facts and has omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, and has engaged in acts, practices and courses of business in connection with the purchase and sale of securities, in violation of Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 12b-20 and 13a-1 thereunder and Rule 3-06 of Regulation S-X, as more particularly described below.

9. On or about April 1, 1973, defendant Teleprompter filed with the Commission an annual report on Form 10-K including a consolidated balance sheet for the year ended December 31, 1972, distributed such report to its stockholders and disseminated it among the investing public. Such report states as

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

assets plant, property and equipment at year-end December 31, 1972 valued at $180,362,075, and the same at year-end December 31, 1971 were valued at $113,885,737. Note 1 to the financial statements disclosed that "The Corporation records additions to plant, property and equipment at cost which includes amounts for materials and applicable labor, overhead and interest." Note 5 disclosed that during the years ended December 31, 1972 and 1971, respectively, interest aggregating approximately $3.2 million and $1.6 million had been capitalized as a cost of construction.

10. The above described report is false and misleading in that it fails to state that capitalized overhead costs included in its valuation of plant, property and equipment constituted approximately $17 million, which fact was material in that Teleprompter reasonably should have known that a reduction in its construction program was likely and that a substantial amount of such capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings.

11. During 1973, Teleprompter made statements and issued press releases and reports regarding anticipated growth of future earnings, its expanded program for construction of facilities, financial strength based upon a $150 million revolving credit and term loan obtained as of approximately April 26, 1973, development of new programs, and the possibility of external growth through acquisitions.

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

12. From on or about January 1, 1973, Teleprompter's management knew or reasonably should have known that its internal financial controls and procedures were inadequate to provide accurate and timely budgets; results of operations reports, and projections of costs and revenues for new acquisitions and existing systems.

13. On or prior to June 7, 1974, Teleprompter's management was aware of potential business problems in that, among other things, the rate of Teleprompter's expenditures would deplete a $150 million line of revolving and term credit obtained as of April 26, 1973 by the first quarter of 1974, whereas it was intended that such credit be sufficient for financing construction programs through December 31, 1974; that Teleprompter had then and in the future would continue to have cash flow problems; that without sufficient funds the construction program would halt; that the halt in such construction activity, under Teleprompter's then current accounting policies, would adversely affect Teleprompter's earnings; that Teleprompter would be "unprofitable" and might realize a net loss in 1973; and that construction should be slowed so as to preserve available sources of funds. Teleprompter's top managment was also advised shortly thereafter that earnings for the second quarter of 1973 would not be as high as those for the first quarter of 1973.

14. Notwithstanding management's awareness of such problems, and notwithstanding that such problems were under consideration, on or about July 12, 1973, Teleprompter issued a

press release [attached as Exhibit I] which announced, among other things, that as a result of an accelerated expansion program second quarter earnings per share were expected to be lower than those of the first quarter of 1973, that the company was in the midst of its building years, and that the company planned to take down the remainder of a $150 million bank credit line in 1973 and 1974 to finance its construction and expansion program. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and that Teleprompter was experiencing other financial problems.

15. On or about August 6, 1973, Teleprompter issued a press release [attached as Exhibit II] which, among other things, re-confirmed the statement in the July 12, 1973 press release that the company was in the midst of its building years and stated that the company was now charging a lower percentage of certain expenditures to capital and deferred accounts than theretofore and charging a greater percentage of such items to expenses for the first six months ended June 30, 1973 than was charged in the first quarter of 1973, and, as a result earnings were 6 cents per common and common equivalent share in the second quarter of 1973 as compared with 22 cents per common and common equivalent share in the first quarter of 1973. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a

reduction in its contruction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and that Teleprompter was experiencing other financial problems.

16. On a number of occasions between June 7, 1973 and September 4, 1973, officers and directors of Teleprompter received information, engaged in discussions and meetings and made decisions relating to the necessity of conserving cash and curtailing Teleprompter's construction program, and relating to the impact that such actions would have upon the financial condition and earnings of Teleprompter.

17. At a meeting of the Board of Directors of Teleprompter on or about August 13, 1973 the Board was informed that the corporation's operations were at a cash-even basis and as a result the corporation's construction of cable television franchises was being financed by funds obtained under the $150 million bank credit. It had been anticipated that the corporation would have a positive cash flow. The Board, at such meeting, approved a program designed to attain the budgeted revenue projection for 1973 by, among other things, increasing the number of subscribers to cable television systems and reducing construction costs by curtailing construction and reviewing the entire construction program to ascertain for which systems construction could be deferred until 1974.

18. On or about August 24, 1973, Robert C. Todd, vice president and treasurer of Teleprompter, met with a vice

president of the First National Bank of Boston, Teleprompter's agent bank in a $150 million Revolving and Term Credit Agreement dated as of April 26, 1973, at which time cash flow figures, proposed curtailment of the construction program and earnings were discussed.

19. By letter of August 28, 1973 [attached as Exhibit III] the vice president of First National Bank of Boston communicated with Todd in which, among other things, he noted that the foundation of the loans was predicated on the cash flow of the company, and suggested that as a result of the marked difference in cash flow between the figures shown him on August 24, 1973 and those originally provided the bank, Teleprompter had a cash flow problem to deal with immediately. The Bank's vice president acknowledged certain steps he understood Teleprompter "seriously considers implementing" to deal with such problem as follows: (1) cutting back construction expenditures wherever possible and practical; (2) reducing overhead expenditures; and (3) considering the possibility of disposing of assets or subsidiaries which are unprofitable or cash users.

20. On or about August 30, 1973, the vice president of the First National Bank of Boston requested that the directors of Teleprompter be polled to determine whether the program, as outlined in the aforementioned letter of August 28, 1973 and as submitted by Todd to the First National Bank of Boston, was authorized by Teleprompter's Board of Directors. The proposals contained in the August 28, 1973 letter were unanimously

approved by the Teleprompter board of directors as indicated in the attached letter from the Secretary of Teleprompter confirming such vote by the board of directors of Teleprompter [Exhibit IV].

21. On or about August 24, 1973, Teleprompter requested from First National Bank of Boston an advance of $12 million under the April 26, 1973 Revolving and Term Credit Agreement but delivery of funds was deferred until all of the banks party to the lending agreement had been informed of the then financial condition of Teleprompter, of its program to curtail construction and improve its financial condition, and of a possible technical default by Teleprompter under the lending agreement.

22. On or about September 4, 1973, Teleprompter issued a press release "concerning rumors circulating about adverse corporate developments" [attached as Exhibit V] in which the company stated:

> "We categorically deny that there are any unannounced adverse developments concerning Teleprompter's business, assets or earnings.
>
> "Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.

"Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions."

23. Such press release issued on September 4, 1973 was materially false and misleading in that, among other things, it failed to disclose that Teleprompter was experiencing cash flow problems, that a request for a drawdown of funds under the $150 million bank credit agreement had been deferred at the request of the lead bank to such agreement, the impact or estimate of the effect the curtailment in construction would have on future income and earnings, the probability that investments in certain cable systems would be written down due to the curtailment of construction, and that increased expenses would be incurred from a new marketing program to obtain new subscribers.

24. In view of the foregoing, unless restrained and enjoined, defendant Teleprompter will continue to violate Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 12b-20 and 13a-1 and Rule 3-06 of Regulation S-X.

WHEREFORE, Plaintiff demands judgment:

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

1. Enjoining defendant Teleprompter and its officers, partners, agents, servants, employees and any other person acting in active concert or participation with it, in connection with the purchase and sale of Teleprompter securities and any other security, from further acts and practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the Commission thereunder, including the dissemination of false and misleading reports and financial statements to shareholders and the investing public, and issuance of false and misleading press releases and public statements.

2. Enjoining defendant Teleprompter and its officers, partners, agents, servants, employees and any other person acting in active concert or participation with it from filing reports and financial statements with the Commission which are materially false and misleading in violation of Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1 and Rule 3-06 of Regulation S-X promulgated by the Commission thereunder.

3. For such and further relief as this Court may deem necessary and appropriate.

Respectfully submitted,

RICHARD S. KRAUT
Assistant Director

CHARLES LERNER
Attorney

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

William D. Moran,
Regional Administrator
Securities and Exchange
Commission
26 Federal Plaza
New York, New York
Telephone: (212) 264-1636

Dated: June , 1974

EXHIBIT — TELEPROMPTER NEWS RELEASE DATED JULY 12 ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone 212-966-7500

For further information
please contact

Don Witheridge

For Immediate Release

New York, July 12 — Teleprompter Corporation announced today that its accelerated expansion program in major CATV markets is expected to result in second quarter earnings per share lower than those of the first quarter of 1973.

Governor Raymond P. Shafer, Chairman and Chief Executive Officer, said "the Company's operations continue to be highly profitable, and income from service for CATV and for the Company as a whole continues to grow.

"The Company," he said, "is now in the midst of its building years. By August 1, Teleprompter will have more than two million homes behind cable, more than twice that of any other company in the cable industry.

"We have taken down $85 million of a $150 million bank credit line", he added, "and plan to take down the remainder this

Exhibit — Teleprompter News Release Dated July 12 Annexed to Foregoing Complaint

year and next to finance our continued record construction and expansion program. This program is our investment in a profitable future. During the period when construction outpaces subscriber additions, a slower earnings-per-share growth-rate may be experienced."

As of June 30, 1973, Teleprompter had 818,716 subscribers with 1,909,489 homes behind cable (a penetration of 42.9 percent) compared with 672,834 subscribers and 1,441,511 homes behind cable (a penetration of 46.7 percent) on June 30, 1972. This represents a 21.7 percent increase in subscribers and a 32.5 percent increase in homes behind cable.

Including franchises recently obtained, Teleprompter now has approximately 4,000,000 homes in its franchise areas located in 34 states.

tpt

73/162

EXHIBIT — TELEPROMPTER NEWS RELEASE DATED AUGUST 6 ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone 212-966-7500

For further information
please contact

Don Witheridge

For Immediate Release

New York, August 6 — Teleprompter Corporation reported today that for the first half of 1973, unaudited net income was $4,758,000, or 28¢ per common and common equivalent share, on revenues of $34,242,000 as compared with unaudited net income of $6,011,000, or 41¢ per common and common equivalent share, on revenues of $29,446,000 for the first half of 1972.

For the second quarter of 1973, unaudited net income was $977,000 or 6¢ per common and common equivalent share on revenues of $17,855,000 as compared with unaudited net income of $3,247,000, or 22¢ per common and common equivalent share, on revenues of $15,060,000 for the second quarter of 1972.

Unaudited net income for the first quarter of 1973 was $3,781,000, or 22¢ per common and common equivalent share,

Exhibit — Teleprompter News Release Dated August 6 Annexed to Foregoing Complaint

on revenues of $16,388,000 as compared with unaudited net income of $2,764,000 or 19¢ per common and common equivalent share, on revenues of $14,385,000 for the first quarter of 1972. The adjustment of per share earnings for the first quarter of 1973 to 22¢ from the 24¢ previously reported reflects the accounting treatment, in accordance with APB 15, of certain contingent shares which at the market price on June 30, 1973 Teleprompter would have been required to issue in connection with prior acquisitions.

The decline in 1973 first half net income, said Raymond P. Shafer, Chairman and Chief Executive Officer, is attributable to a number of factors. These include a substantial increase in depreciation and amortization over the first half of 1972 — primarily as a result of accelerated construction of CATV systems, the impact of new CATV systems becoming "operational," increased expenses for local program origination and higher electronic data processing expenses.

As reported on July 12, Teleprompter is in the midst of its building years, a period when construction outpaces subscriber additions and, during this period, slower earnings-growth may be experienced. In the past two years, Teleprompter has spent more than $100,000,000 on additions to its cable plant. A lower penetration level of 42.9 percent at June 30, 1973 — 818,716 subscribers with 1,909,489 homes behind cable — as compared with a 46.7 percent level on June 30 a year ago — 672,834 subscribers with 1,441,511 homes behind cable — has adversely affected earnings during the current year to date.

Exhibit — Teleprompter News Release Dated August 6 Annexed to Foregoing Complaint

The expenses incurred in connection with local program origination are primarily "start-up." They provide a foundation for sales of advertising, particularly in systems which have sizeable viewing audiences, and they put Teleprompter in a position to comply with present and future federal and local CATV regulations concerning local origination of programs. The expenses incurred for expanded data processing capacity now enable Teleprompter to service foreseeable growth in customer accounts and to provide ancillary services and billing for Pay TV.

A significant addition to plant resulted from Teleprompter's bringing 20 CATV systems — three of them acquired — into an "operational" status in the first half of the year as compared with only one system becoming "operational" during all of 1972. A new cable system is considered "operational" 18 months after the first subscriber installation or when 25 percent of the homes in the franchise area are connected, if earlier. During the preoperational period, operating losses incurred are deferred and amortized over a 10 year period. This method of determining when a system becomes operational was adopted some years ago on the assumption that a system would reach the break-even point when it becomes operational. Although recent experience indicates that a longer period may be required, particularly in major urban markets, to reach the break-even point, Teleprompter is continuing to use the same method of determining when a system becomes operational. During the first half of 1973 an unprecedented number of systems became operational, which had a substantial negative effect on reported earnings in that period. By reason of the continued progress of

Exhibit — Teleprompter News Release Dated August 6 Annexed to Foregoing Complaint

the company and the much smaller number of systems becoming operational in the second half of 1973, management anticipates better earnings in the second half of the year.

In view of the large number of new systems which became operational during 1973 and the current status of the construction progress and other items enumerated above, management recently reviewed its procedures for charging certain expenditures to capital and deferred accounts. In light of presently available information, management decided, within the framework of its established accounting policies, to charge a greater percentage of such items to expenses for the six months ended June 30, 1973 than was charged in the first quarter of 1973. The full impact of such increase in charges to expenses for the first half of 1973 is reflected in 1973 second quarter earnings. Management's decision, and the resultant substantially reduced second quarter 1973 earnings, stem from its conclusion that adjustments to interim earnings should be made as additional information about operations becomes available in order to minimize year-end adjustments.

If the decision to increase current expense charges were applied to earnings for the first quarter of 1973, management estimates the 1973 second quarter earnings would have been approximately 15¢ per common and common equivalent share, with a corresponding decrease 1973 first quarter earnings.

tpt

73/177

* * *

EXHIBIT — LETTER DATED AUGUST 28, 1973 FROM THE FIRST NATIONAL BANK OF BOSTON TO TELEPROMPTER CORPORATION ANNEXED TO FOREGOING COMPLAINT

RECEIVED
G 30 19
R.C. TODD, JR.
August 28, 1973

Ira Stepanian
Vice President

Mr. Robert C. Todd
Vice President, Finance
Teleprompter Corporation
50 West 44th Street
New York, New York 10036

Dear Bob:

Thank you for reviewing with us the revised cash flow figures on Friday, August 24. The data that you presented to us was most informative in that it detailed a number of aspects of cash flow which had been omitted in previously submitted figures and were not, in my opinion, already presented in those public documents which have been available up to this point. This revised format of information should continue to be made available to us on a regular basis. As you know, the foundation of our loans had been, and still is, predicated on the cash flow of the Company. The marked difference in cash flow between the new figures and those originally provided us clearly indicate that

Exhibit — Letter Dated August 28, 1973 from The First National Bank of Boston to Teleprompter Corporation Annexed to Foregoing Complaint

the Company has a problem which should be dealt with immediately. I understand, however, that the Company intends to seriously consider implementing the following steps.

1. Cut back construction expenditures wherever possible and practical.

2. Eliminate all acquisitions requiring cash outlays or assumption of debt or which would require net outflows of cash for construction.

3. Place limits on the type and extent of new franchise solicitations.

4. Reduce overhead expenditures.

5. Consider the possibility of disposing of assets or subsidiaries which are unprofitable or cash-users.

As Agent Bank in the Revolving and Term Credit Agreement dated as of April 26, 1973, we will endeavor to work with you in resolving the problem, but our task in doing so will be greatly facilitated if we can assure the banks that you will take immediate steps to implement the above program. I would appreciate your documenting your actions in this regard.

If you have any questions, or wish to discuss the outlined program in more detail, please feel free to contact me. Please

Exhibit — Letter Dated August 28, 1973 from The First National Bank of Boston to Teleprompter Corporation Annexed to Foregoing Complaint

advise me also of your time availability in order that the information you have provided us can be presented to the other participants in the Credit.

Sincerely

s/ Ira Stepanian
Ira Stepanian
Vice President

cc: Mr. Raymond P. Shafer, Chairman of the Board
Mr. William J. Bresnan, President
Mr. Marvyn Carton, Chairman, Finance Committee

EXHIBIT — MEMORANDUM TO DIRECTORS BY SHEA, GOULD, CLIMENKO & KRAMER ANNEXED TO FOREGOING COMPLAINT

SHEA, GOULD, CLIMENKO & KRAMER

330 Madison Avenue

New York, New York 10017

September 4, 1973

MEMORANDUM TO DIRECTORS

On Thursday, August 30th, Ira Stepanian, Vice-President, The First National Bank of Boston ("Bank"), orally requested Robert C. Todd, Vice-President — Finance and Treasurer, to conduct a telephone poll of the Directors. The stated purpose of the requested poll was to determine whether in the opinion of the individual directors, the program submitted on August 30th to the Bank by Mr. Todd with the concurrence of Messrs. Shafer and Bresnan, in response to the letter of the Bank dated August 28th (Exhibit 1 hereto), requesting a documented reply was authorized by the Board of Directors at its August 13th meeting. A copy of the undated written program submitted by Mr. Todd in response to the Bank's request is annexed as Exhibit 2.

Item 2 of the Bank's letter (Exhibit 1) with respect to acquisitions was not covered by the program submitted to the Bank (Exhibit 2) for the reason that the Bank had previously

advised the Corporation that in accordance with the provisions of the Credit Agreement, the Bank's consent was necessary for acquisitions which in the aggregate exceeded $10,000,000 since December 31, 1972, and since that limit had already been reached by acquisitions previously approved by the Board, the Bank requested additional data including cash flow projections before reviewing any request for consent to exceed such limit.

Item 3 of the Bank's letter (Exhibit 1) with respect to new franchise solicitations was not covered by the program submitted to the Bank (Exhibit 2) for the reason that the Bank had earlier been informed that criteria for new franchise applications were under review as well as alternative financing via limited partnerships which did not require the credit of the Corporation (August 15 Draft of Minutes of Board meeting of August 13, 1973 pages 10, 21 and 23).

On Thursday, August 30th and Friday, August 31st, at the request of Mr. Todd, the undersigned and Mr. Todd contacted each of the directors, with the exception of Mr. Wrather on whose behalf Mr. Livingston spoke. The directors individually and unanimously concurred that the program submitted by management to the Bank was within the scope of the authorization given to management at the August 13th meeting.

Mr. Lowe requested that the minutes of the polling reflect his comment that although he concurs in the statement that management was authorized by the prior actions of the Board, to submit the program to the Bank, and although he appreciates

Exhibit — Memorandum to Directors by Shea, Gould, Climenko & Kramer Annexed to Foregoing Complaint

that the program does not purport to carry Board approval for any of the amounts stated therein, that by reason of prior experience with data requested of and furnished by management to the Board, in his view management should submit to the Board the basis for the proposed reduction in construction expenditures so that the Board can determine whether the program has its approval.

s/ Bernard D. Fischman

EXHIBIT — TELEPROMPTER NEWS RELEASE DATED SEPTEMBER 4 ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone 212-986-7500

For further information
please contact

Don Witheridge

For Immediate Release

New York, September 4 — Teleprompter Chairman and Chief Executive Officer Raymond P. Shafer made the following announcement concerning rumors circulating about adverse corporate developments.

"We categorically deny that there are any unnannounced adverse developments concerning Teleprompter's business, assets or earnings.

"Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.

Exhibit — Teleprompter News Release Dated September 4 Annexed to Foregoing Complaint

"Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions.

"As a result of its expanded construction program Teleprompter at August 31, 1973 had cable behind approximately 2 million homes in its franchised areas and had approximately $50,000 primary subscribers."

tpt

73/174

EXHIBIT — CONSENT JUDGMENT ANNEXED TO FOREGOING COMPLAINT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- vs -

TELEPROMPTER CORPORATION,

Defendant.

CIVIL ACTION NO.

C O N S E N T

Defendant, Teleprompter Corporation ("Teleprompter"), consents to the entry of the Final Judgment annexed hereto as follows:

1. Teleprompter admits the jurisdiction of this Court over it and over the subject matter of this action, and admits service of the Summons and Complaint upon it.

2. Teleprompter, without admitting or denying any of the allegations in the Complaint, except as to jurisdiction, hereby

Exhibit — Consent Judgment Annexed to Foregoing Complaint

consents to the entry of the annexed Final Judgment of Permanent Injunction.

3. Teleprompter consents to the annexed Final Judgment for the purpose of this action only and such consent is entered into without trial or argument of any issue of fact or law and does not constitute any evidence or admission or denial by Teleprompter or by its agents, servants, employees or any person in active concert or participation with them with respect to any such issue or of any wrongdoing or liability for any purpose.

4. Teleprompter consents to the entry of a Final Judgment in the form annexed hereto, enjoining Teleprompter its agents, servants and employees, successors and assigns and those persons in active concert or participation with it and each of them from violating Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b) and 78m(a)] and Rules 10b-5, 12b-20 and 13a-1 and Rule 3.06 of Regulation S-X [17 C.F.R. 240.10b-5, 12b-20 and 13a-1 and 17 C.F.R. 210.3-06] thereunder.

5. Teleprompter waives entry of findings of fact and conclusions of law provided by Rule 52 of the Federal Rules of Civil Procedure.

6. Teleprompter states that it enters into this consent voluntarily and that no promise or threat whatsoever has been made by plaintiff Securities and Exchange Commission or any member, officer, agent or representative thereof to induce it to enter into this consent.

Exhibit — Consent Judgment Annexed to Foregoing Complaint

7. Teleprompter agrees that the Final Judgment in the form annexed hereto, may be presented by plaintiff Securities and Exchange Commission to the Court for signature and entry without further notice.

8. Teleprompter agrees that this Court shall retain jurisdiction over it upon entry of the Final Judgment in the form annexed hereto, for the purpose of enforcing or modifying the terms and conditions contained in said Judgment.

9. This Consent shall be incorporated by reference in the Final Judgment of a Permanent Injunction, in the form annexed hereto, to be entered by the Court in this action.

Dated: _____

EXHIBIT — TELEPROMPTER NEWS RELEASE ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone, (212) 986-7500

For further information
please contact

Barry P. Simon

Teleprompter Corporation stated today that it consented to the issuance of an injunction in a case brought today by the Securities and Exchange Commission against the Company.

The Company consented to the injunction solely to avoid protracted litigation which would involve a drain on management's time and energies and involve substantial legal expenses. Teleprompter denies that it has engaged in any violation of law. It particularly denies, and objects to, any inference which could be drawn from allegations in the complaint to the effect that an injunction is necessary in order to cause Teleprompter to comply with the law.

Since September 1973 when Jack Kent Cooke became Chairman and Chief Executive Officer and continuing through to the recent appointment of Russell Karp as the Company's new president, Teleprompter's management has been completely overhauled and strengthened. Every effort has been made by

Exhibit — Teleprompter News Release Annexed to Foregoing Complaint

Teleprompter's new management to comply with both the letter and spirit of the Security Laws and it is confident that it has done so. Thus, Teleprompter recently took the unusual step of mailing to each of its stockholders its complete 10K Report for 1973 — so each of them could have access to the detailed information usually available only to professional investors. And in the 10K Report itself, Teleprompter took great pains to make the report as complete and as clear as possible.

As to the SEC complaint itself, much of it is based on the allegation that Teleprompter should have disclosed in previous financial statements and press releases the amount of construction related expenditures which it capitalized. Teleprompter emphasizes that

(a) The point raised by the SEC is entirely novel insofar as Teleprompter is aware. Teleprompter does not know of any other company which discloses the amount of construction related expenditures which it capitalizes; and

(b) Nevertheless, since last fall Teleprompter has, in fact, been disclosing the amount of construction related expenditures which it capitalized.

Teleprompter stated that the principal relief in the decree related to the maintenance or establishment by Teleprompter of internal procedures for the preparation of internal budget forecasts and

Exhibit — Teleprompter News Release Annexed to Foregoing Complaint

other data. Teleprompter can easily and gracefully accept the decree because these procedures have been done, are being done, and will be done.

Teleprompter is happy that the SEC investigation is now behind it.

* * *

NOTICE OF MOTION OF FIRST NATIONAL BANK OF BOSTON TO DISMISS

(Filed August 20, 1974)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against

TOUCHE, ROSS & CO., et al.,

Defendants.

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Phillip A. Shaver, sworn to August 9, 1974, and the Exhibits thereto, and upon all of the papers heretofore filed, the undersigned will move before Hon. John M. Cannella, a Judge of this Court, at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 29th day of August, 1974, for an order, pursuant to Rules 12(b)(2) and (3) of the Federal Rules of Civil Procedure, dismissing the above-entitled action as against defendant the First National Bank of Boston on the ground that, pursuant to Section 94 of the National Bank Act (12 U.S.C. Sec. 94), venue of this action

Notice of Motion of First National Bank of Boston to Dismiss

as to the First National Bank of Boston is improper in the Southern District of New York.

Dated: New York, New York
August 19, 1974

Yours, etc.,

DEVEVOISE, PLIMPTON, LYONS & GATES

By (Sgd) Robert L. King
A Member of the Firm
Attorneys for Defendant The
First National Bank of Boston
299 Park Avenue
New York, New York 10017
(212) 752-6400

TO:

IRA JAY SANDS, ESQ.
Attorney for Plaintiff
701 Seventh Avenue
New York, New York 10036

SAMUEL GOTTLIEB, ESQ.
GAINSBURG, GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff
122 East 42nd Street
New York, New York 10017

Notice of Motion of First National Bank of Boston to Dismiss

SHEA GOULD CLIMENKO & KRAMER
Attorneys for Defendant
Teleprompter Corporation
330 Madison Avenue
New York, New York 10017

ROSENMAN, COLIN, KAYE, PETSCHEK, FREUND & EMIL
Attorneys for Defendant Touche, Ross & Co.
575 Madison Avenue
New York, New York 10022

AFFIDAVIT OF PHILIP A. SHAVER IN SUPPORT OF MOTION TO DISMISS
(Filed August 20, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHLAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Defendants.

74 Civ. 3025 (JMC)

STATE OF MASSACHUSETTS)
:
COUNTY OF SUFFOLK)

PHILIP A. SHAVER, being first duly sworn, deposes and says:

Affidavit of Philip A. Shaver in Support of Motion to Dismiss

1. I am Assistant Vice President, Associate Counsel and Secretary pro tempore of the Board of Directors of the First National Bank of Boston, ("Bank"), and I make this affidavit in support of the motion of the Bank pursuant to Title 12, U.S.C.A. 94, to dismiss the action as to the Bank for lack of proper venue.

2. The Bank is a national banking association incorporated under the banking laws of the United States (Title 12, U.S.C.A.), with its only place of business for conducting banking business located in the City of Boston, State of Massachusetts.

3. The Bank maintains no office, facility, or place of business of any kind in the Southern District of New York or in the State of New York, has no office or agent in either of them, except that solely in connection with its qualification pursuant to Section 131(3) of the Banking Law of New York to act in a fiduciary capacity in the surrogate's courts of the state and in other fiduciary capacities in the state, the Bank filed an instrument on January 15, 1971 appointing the Superintendent of Banks of the State of New York as its attorney upon whom all process could be served, in any action affecting or relating to an estate, trust or fund held or represented by it.

4. The Bank is a federally chartered National Banking Association, at the located specified in its charter, to wit, in the City of Boston, County of Suffolk, State of Massachusetts. True copies of the Articles of Incorporation and the Certificate of the Comptroller of the Currency are attached hereto as Exhibits A and B, respectively, and are made a part hereof.

Affidavit of Philip A. Shaver in Support of Motion to Dismiss

5. On the basis of the foregoing, I respectfully urge that the Motion of the Bank to dismiss the complaint as to it be granted.

6. The submission of this Affidavit shall not be construed as any waiver of the Bank's objection to its being sued in the United States District Court for the Southern District of New York on the grounds that under Section 12 of the National Bank Act venue in that District is improper.

(Sgd) Philip A. Shaver
Philip A. Shaver

Subscribed and sworn to this ninth
day of August, 1974.

(Sgd) Trudy Lee Wood
Notary Public in and for the County of Suffolk, State of Massachusetts

My commission Expires April 24, 1981

EXHIBIT — ARTICLES OF INCORPORATION ANNEXED TO FOREGOING AFFIDAVIT

The FIRST NATIONAL BANK of BOSTON

Boston, Massachusetts

Certified Copy

of the

Articles of Association

The FIRST NATIONAL BANK of BOSTON

Certified Copy

of the

Articles of Association

I, the undersigned, T. McLean Griffin, DO HEREBY CERTIFY that:

1. I am the Cashier and the Secretary of the Board of Directors of THE FIRST NATIONAL BANK OF BOSTON (hereinafter called the "*Bank*") and in that capacity have custody of its corporate records and have authority to certify to such records.

2. Set forth below is a complete and correct copy of the Articles of Association of the Bank as they are in effect on the date of this certificate:

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

Charter No. 200

ARTICLES OF ASSOCIATION

FIRST. The title of this Association shall be "The First National Bank of Boston".

SECOND. The Head Office of this Association shall be in the City of Boston, in the County of Suffolk and Commonwealth of Massachusetts. The general business of this Association shall be conducted at its Head Office and at its legally established branches.

THIRD. The Board of Directors of this Association shall consist of such number of shareholders, not less than five nor more than twenty-five, as shall be determined from time to time by resolution of a majority of the votes to which all of the shareholders are at the time entitled to cast at any annual or special meeting of the shareholders. Unless otherwise provided by the laws of the United States, any vacancy in the Board of Directors for any reason, including an increase in the number thereof, may be filled by action of the Directors remaining.

FOURTH. The regular annual meeting of the shareholders of this Association for the election of directors and the transaction of whatever other business may be properly brought before said meeting shall be held at the Head Office, or such other convenient place as the Board of Directors may designate, on the day of each year specified therefor in the By-Laws of this

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

Association, but if no election is held on that day it may be held on any subsequent day in accordance with the provisions of the laws of the United States. All elections shall be held in accordance with such lawful regulations as may be prescribed by the Board of Directors.

FIFTH: The authorized amount of Capital Stock of this Association shall be $90,000,000, divided into 7,200,000 shares of the par value of $12.50 each; but said Capital Stock may be increased or decreased from time to time in accordance with the provisions of the laws of the United States.

If the Capital Stock of this Association is increased by the sale of additional shares thereof for cash only, each shareholder shall be entitled to subscribe for such additional shares in proportion to the number of shares of the Capital Stock owned by him at the time the increase is authorized by the shareholders, unless another time subsequent to the date of the shareholders' meeting is specified in a resolution adopted by the shareholders at the time the increase is authorized. The Board of Directors shall have the power to prescribe a reasonable period of time within which the pre-emptive rights to subscribe to the new shares of Capital Stock must be exercised.

This Association, at any time and from time to time, may authorize and issue debt obligations, whether or not subordinated, and whether or not convertible into shares of the Capital Stock, without the approval of the shareholders. If debt obligations are issued by this Association which are convertible

into shares of the Capital Stock, no holder of Capital Stock shall have, as such, any pre-emptive or preferential rights to subscribe for, purchase or receive debt obligations or any shares of the Capital Stock which may be issued upon the conversion of any such debt obligations. The Board of Directors, in its discretion, may determine the terms and conditions of such obligations and the method and terms of issue and sale thereof.

SIXTH. The Board of Directors (a majority of which shall be a quorum to transact business) shall appoint one of its members to be President of this Association who shall hold office (unless he shall become disqualified or be sooner removed by a two-thirds vote of the members of the Board) for the term for which he was elected a director. The Board of Directors may appoint one of its members to be Chairman of the Board, who shall perform such duties as may be designated by it. The Board of Directors shall have power to appoint one or more Vice Presidents, and to appoint a Cashier and such other officers and employees as may be required to transact the business of this Association.

The Board of Directors shall have the power to define the duties of the officers and employees of this Association; to fix the salaries to be paid to them; to dismiss them; to require bonds from them and to fix the penalty thereof; to regulate the manner in which any increase of the capital of this Association shall be made to manage and administer the business affairs of this Association; to make all By-Laws that it may be lawful for them

to make; and generally to do and perform all acts that it may be legal for a board of directors to do and perform.

SEVENTH. The Board of Directors shall have the power to change the location of the Head Office of this Association to any other place within the limits of the City of Boston, Massachusetts, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency, and shall have the power to establish or change the location of any branch or branches of this Association without the approval of the shareholders but subject to such limitations as from time to time may be provided by law.

EIGHTH. The corporate existence of this Association shall continue until terminated in accordance with the laws of the United States.

NINTH. The Board of Directors, or the holders of not less than one-tenth of the outstanding Capital Stock of this Association, may call a special meeting of shareholders at any time; *provided, however,* that unless otherwise provided by law, not less than ten days prior to the date fixed for any such meeting, a notice of the time, place and purpose of the meeting shall be given by first-class mail, postage prepaid, to each shareholder of record at his address as shown upon the books of this Association.

TENTH. Any person, his heirs, executors or administrators, may be indemnified or reimbursed by this

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

Association for reasonable expenses actually incurred in connection with any action, suit or proceeding, civil or criminal, to which he or they shall be made a party by reason of his being or having been a director, officer or employee of this Association or of any firm, corporation or organization which he served in any such capacity at the request of this Association; *provided, however,* that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding as to which he shall finally be adjudged to have been guilty of or liable for gross negligence, willful misconduct or criminal acts in the performance of his duties to this Association; and *provided, further,* that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding which has been made the subject of a compromise settlement except with the approval of a court of competent jurisdiction, or the holders of record of a majority of the outstanding shares of this Association, or the Board of Directors, acting by vote of directors not parties to the same or substantially the same action, suit or proceeding, constituting a majority of the whole number of the directors. The foregoing right of indemnification or reimbursement shall not be exclusive of other rights to which such person, his heirs, executors or administrators may be entitled as a matter of law.

This Association may, upon the affirmative vote of a majority of its Board of Directors, purchase insurance for the purpose of indemnifying its directors, officers and other employees to the extent that such indemnification is allowed in the preceding paragraph. Such insurance may, but need not, be for the benefit of all directors, officers or employees.

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

ELEVENTH. These Articles of Association may be amended at any regular or special meeting of the shareholders by the affirmative vote of the holders of a majority of the outstanding shares of Capital Stock of this Association, unless the vote of the holders of a greater amount of such Captial Stock is required by law, and in that case, by the vote of the holders of such greater amount thereof.

IN WITNESS WHEREOF, we have hereunto set out hands this 10th day of September, 1970.

ROGER C. DAMON
Roger C. Damon

RICHARD D. HILL
Richard D. Hill

WILLIAM L. BROWN
William L. Brown

J. WARREN OLMSTED
J. Warren Olmsted

GEORGE E. PHALEN
George E. Phalen

IN WITNESS WHEREOF, I have hereunto set my hand and affixed hereto the seal of THE FIRST NATIONAL BANK OF BOSTON this 13th day of August, 1974.

s/ T. McLean Griffin
Cashier and Secretary of the
Board of Directors

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY

On the 13th day of August, 1974, before me, the undersigned Notary Public in and for said Commonwealth duly commissioned and sworn, personally came T. McLEAN GRIFFIN, to me known, who, being by me duly sworn, did depose and say that he resides at No. 14 Beckford Street, Salem, Massachusetts; that he is the Cashier and Secretary of the Board of Directors of THE FIRST NATIONAL BANK OF BOSTON, a national banking association organized and existing under the laws of the United States of America; that he executed the foregoing certificate in his capacity aforesaid as his free act and deed and that the seal affixed thereto is the seal of said Bank, and that he was duly authorized by the Board of Directors of said Bank to execute said certificate and to affix the seal of said Bank thereto.

s/ Trudy Lee Wood
Notary Public

TRUDY LEE WOOD
NOTARY PUBLIC
My Commission expires April 24, 1981

EXHIBIT — CERTIFICATE OF THE COMPTROLLER OF THE CURRENCY ANNEXED TO FOREGOING AFFIDAVIT

CERTIFICATE

TREASURY DEPARTMENT)
Office of) ss:
Comptroller of the Currency)

J.T. Watson, Deputy Comptroller of the Currency, do hereby certify

1. Pursuant to Revised Statutues 324, et seq., as amended, 12 U.S.C. 1, et seq., the Comptroller of the Currency charters and exercises regulatory and supervisory authority over all national banking associations;

2. On January 16, 1864, Safety Fund Bank of Boston, Boston, Massachusetts, was chartered as a National Banking Association under the laws of the United States and under the title of "The First National Bank of Boston";

3. The document hereto attached is a true and complete copy of the Charter Certificate issued to The First National Bank of Boston, Boston, Massachusetts, the original of which certificate was issued by the office on January 16, 1864;

4. Effective as of the opening of business January 4, 1971, this bank merged into The Massachusetts Bank, National Association, Boston Massachusetts, under the title of "The First National Bank of Boston"; and

Exhibit — Certificate of the Comptroller of the Currency Annexed to Foregoing Affidavit

5. The First National Bank of Boston, Boston, Massachusetts, continues to hold a valid certificate to do business as a National Banking Association.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of Office of the Comptroller of the Currency to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 17th day of February, A.D. 1972.

s/ J. T. Watson
Deputy Comptroller of the Currency

TREASURY DEPARTMENT
Office of Comptroller of the Currency,

Washington, January 16, 1864.

WHEREAS, by satisfactory evidence presented to the undersigned, it has been made to appear that the First National Bank of Boston in the County of Suffolk and State of Massachusetts has been duly organized under, and according to the requirements of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof; approved February 25, 1863, and has complied with all the provisions of said act required to be complied with before commencing the business of Banking:

Exhibit — Certificate of the Comptroller of the Currency Annexed to Foregoing Affidavit

NOW, THEREFORE, I. Hugh Mc Gillock Comptroller of the Currency, do hereby certify that the said First National Bank of Boston, County of Suffolk and State of Massachusetts is authorized to commence the business of Banking under the act aforesaid.

IN TESTIMONY WHEREOF, witness my hand and seal of office, this sixteenth day of January, 1864.

s/ Hugh McGillock
Comptroller of the Currency.

AFFIDAVIT OF IRA JAY SANDS IN OPPOSITION BY PLAINTIFF TO MOTION OF DEFENDANT FIRST NATIONAL BANK OF BOSTON TO DISMISS
(Filed September 23, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

74 Civ. 3025 (JMC)

STATE OF NEW YORK: SS.:

COUNTY OF NEW YORK

IRA JAY SANDS, being duly sworn, deposes and says:

I am the attorney for plaintiff. I submit this affidavit and the accompanying Memorandum of Law in Opposition to the Motion of First National Bank of Boston to Dismiss the Complaint as to Them.

Affidavit of Ira Jay Sands in Opposition by Plaintiff to Motion of Defendant First National Bank of Boston to Dismiss

Their motion is based upon the illusion that despite their affirmative designation of the Superintendent of Banks of New York as an agent for service of process upon them, they can escape being sued in this state because of their reliance upon Section 94 of the National Bank Act. However, they are inaccurate as it affects the First National Bank of Boston.

Under normal circumstances, of course, Section 94 of the National Bank Act would prevent a bank foreign to this judicial district from being sued in this judicial district. However, plaintiff has obtained a copy of a letter dated January 15, 1971 to "Legal Division, State of New York Banking Department" from First National Bank of Boston over the signature of its Vice President (with copy to the Superintendent of Banks of the State of New York) enclosing for filing various instruments "designating the Superintendant of Banks of the State of New York or his successor, as agent for service of process".

The designation form itself states:

> "This Bank desires to transact business in the State of New York. . . . The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank, in and for the State of New York, upon whom all lawful process in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein."

Affidavit of Ira Jay Sands in Opposition by Plaintiff to Motion of Defendant First National Bank of Boston to Dismiss

Attached hereto as Exhibit "A" is a copy of the letter of January 15, 1971 from the Bank to the Legal Division, New York Banking Department. Attached hereto as Exhibit "B" is a copy of a designation of the Bank which was acknowledged by the Official Cashier of the Bank on January 15, 1971.

It is respectfully urged that since this particular Bank has sought the privilege under the laws of the State of New York to conduct business within the State of New York and has voluntarily filed certificates designating an officer of the State of New York as agent for the service of process in the State of New York, this Bank cannot now be heard to say that such official act of consent was really meaningless and of no force or effect, but rather an empty gesture in 1971.

The attached Memorandum of Law submitted by plaintiff sets forth statutory support for the position taken by plaintiff. Therefore, the motion by the Defendant Bank should be denied.

(Sgd) Ira Sands
IRA JAY SANDS

Sworn to before me

this 18th day of September, 1974.

(Sgd) Raymond Burrasca
Notary Public, State of New York

My commission expires March 30, 1976

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT OF IRA JAY SANDS

January 15, 1971

Legal Division
State of New York
Banking Department
100 Church Street
New York, New York

Gentlemen:

Pursuant to the enclosed copies of a letter dated December 9, 1970 which we received from Peter J. Sparano, Administrative Officer we are enclosing herewith for filing, as required by Section 131(3) of the New York Banking Law, the following instruments on behalf of The First National Bank of Boston:

1. A Power of Attorney executed by The First National Bank of Boston under date of January 15, 1971, designating the Superintendent of Banks of the State of New York or his successor, as agent for service of process, and further designating T. McLean Griffin, Cashier, and his successors in office, as being the appropriate officer to whom process shall be forwarded.

2. A certified copy of the Articles of Association of The First National Bank of Boston.

3. An affidavit signed by the Bank's counsel, Edward M. Coudit, Jr., Esquire, certifying that

reciprocity exists between Massachusetts and New York.

4. Certificates of the Comptroller of the Currency with respect to the merger of the Bank and Old Colony Trust Company and with respect to the interim conversion of Old Colony Trust Company into a national bank.

We note that as the result of a merger on January 4, 1971, The First National Bank of Boston continues the heretofore existing fiduciary appointments of Old Colony Trust Company, a Massachusetts corporation, and is entitled to further appointments under instruments in which Old Colony Trust Company is named, as well as appointments in the name of The First National Bank of Boston.

We also note that favorable reciprocity for foreign banks acting as fiduciaries in Massachusetts continues in effect under Massachusetts General Laws, Chapter 167, Section 45A, a copy of which is enclosed.

Please advise us if you require anything further in connection with our continued qualification under Section 131.

Very truly yours,

THE FIRST NATIONAL BANK OF BOSTON

By _____
Vice President, Old
Colony Trust Division

Enclosures

Copies to:
Mr. William T. Pantzer, Jr.
Superintendent of Banks
State of New York State House
Albany, New York

Mr. T. McLean Griffin, Cashier
The First National Bank of Boston

KNOW ALL MEN BY THESE PRESENTS that I.T. McLEAN GRIFFIN am Cashier of The First National Bank of Boston, a national banking association located in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, and organized under the laws of the United States of America. This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law The First National Bank of Boston hereby constitutes and appoints the Superintendant of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein.

THE FIRST NATIONAL BANK OF BOSTON hereby designates the undersigned, T. McLEAN GRIFFIN, Cashier, and his successors in office, to be the appropriate officer of the

Exhibits Annexed to Foregoing Affidavit of Ira Jay Sands

Bank to whom proceeds shall be forwarded by the Superintendant of Banks.

s/ T. McLean Griffin
T. McLEAN GRIFFIN,
Cashier

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK

The above T. McLEAN GRIFFIN personally appeared before me and acknowledged this statement to be his free act and deed, before me, this 15 day of January, 1971.

s/ (illegible)
Notary Public

ADDITIONAL AFFIDAVIT IN OPPOSITION BY PLAINTIFF TO MOTION OF DEFENDANT THE FIRST NATIONAL BANK OF BOSTON TO DISMISS THE COMPLAINT AS TO IT
(Filed September 24, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

74 Civ. 3025 (JMC)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

IRA JAY SANDS, being duly sworn, deposes and says:

The Reply Memorandum of this Defendant wrongly claims that its qualification to do Banking business in New York, designated the Superintendent of Banks of the State of New York, in a "limited capacity only."

Additional Affidavit in Opposition by Plaintiff to Motion of Defendant the First National Bank of Boston to Dismiss the Complaint as to It

Plaintiff respectfully submits that the defendant is inaccurate on the state of the law, is inaccurate in its citations, and is inaccurate on the facts of its own designation of the Superintendent of Banks.

First, the written designation by this defendant of the Superintendent of Banks as its agent for service of process, was not limited in any manner. On the contrary, it is widespread and unlimited with respect to matters which occur within the State of New York.

This defendant Bank failed to do what the Chase National Bank did in *Buffum v. Chase National Bank,* 192 F.2d 58, 61 (2nd Cir. 1951), where the Chase Bank first had originally designated in Illinois, that its agent would accept service "in all suits in Illinois", but later, replaced that designation with another resolution limiting the service to specific matters.

Our defendant Bank has designated its New York agent broadside, without limitation, as Chase originally had done in Illinois before it corrected itself.

In fact, the *Buffum* case, cited so strongly by our defendant in its support, is directly against our defendant. In *Buffum,* the Court emphasized that the consent to be sued which had been executed by Chase National Bank was "limited" in its language, for it said (p. 59):

Additional Affidavit in Opposition by Plaintiff to Motion of Defendant the First National Bank of Boston to Dismiss the Complaint as to It

> "In connection with the acceptance and execution of trusts and receipts of deposits and trust funds in Illinois."

Our defendant cannot show any language in its designation which limits the scope, as *Buffum* did in writing.

On page 60, the decision again referred to the fact that the Chase Bank had not consented to be sued in Illinois except "in connection with the acceptance and execution of trusts and receipts of deposits of trust funds in Illinois." The Court further stated that these matters were not invovled in the action.

The logic is that the Court would have not gone so far out of its way so many times to explain that the subject of the action was not within the precise limiting language of the Chase Bank's written designation.

The *Buffum* Court emphasized that the shield of Section 94 can be waived by a Bank, by deed or by word.

On page 61, the *Buffum* Court discussed in detail the type of action involved, and concluded that the specific limitation by the Chase Bank of its waiver did not include the contract business which was the subject of the litigation.

From the specific logic of the *Buffum* case, it is clear that this Court can precisely hold that since the First National Bank

of Boston designated the Superintendent of Banks without limitation, to accept service in actions resulting from New York transactions, the bank intentionally waived and did not preserve to itself protection against any specific type of litigation.

The defendant also cites *Tuthill v. George May International,* 55 Misc.2d 542, 285 N.Y.S. 2d 317 (Sup. Ct. Suffolk 1967); but Tuthill is not in point. There, the plaintiff was suing his employer in connection with the employer's profit-sharing trust which had funds deposited in the Continental Illinois Bank in Chicago. It was admitted that the trust was established and administered in Chicago, and all funds for the trust were there deposited with no funds deposited in New York. The transaction therefore did not take place in New York. Whether or not Continental Illinois had designated the Superintendent of Banks to accept process with respect to *transactions that took place in New York,* did not apply to that situation.

With respect to the letter from our defendant First National Bank of Boston, to the New York State Superintendent of Banks, this was *not* supplied to the Court by the defendants, and was only furnished to plaintiff's counsel after we had ascertained the probable existence of such a designation by the defendant, and only *after* our request that such designation be produced.

Of course we are not suggesting that the defendants were withholding evidence or misleading the Court and the language

was certainly not chosen with any intent other than to present for the Court's examination the designation of the Superintendent of Banks, which had been voluntarily filed by this defendant for its own benefit.

The fact that the Bank may maintain no active facility or place of business in New York does not water down its clear unqualified designation of the Superintendent of Banks as agent for process. Despite its claim on page 4 of its memorandum that the designation of the Superintendent of Banks was for the purpose of service "in any action affecting or relating to an estate, trust or fund, held or represented by it" no such language or similar language appears in the broad scale designation.

Neither does Section 131 (3) of the New York State Banking Law limit the broadscale designation which this Bank filed.

Furthermore, defendant Bank is inaccurate on page 4 of its memorandum in stating that we suggest that service would be proper for any matter "arising out of its general banking business conducted in Boston."

We did *not* so state! Plaintiff's position is that the designation by this defendant Bank, covers suits arising out of its business *conducted in New York*.

Additional Affidavit in Opposition by Plaintiff to Motion of Defendant the First National Bank of Boston to Dismiss the Complaint as to It

WHEREFORE, it is respectfully urged that the broadscale waiver by the Bank, and written designation of the Superintendent of Banks, voluntarily filed by the First National Bank of Boston, mandates that its motion be denied.

(Sgd) Ira Jay Sands
IRA JAY SANDS

Sworn to before me this

day of September, 1974

EXHIBIT ANNEXED TO FOREGOING ADDITIONAL AFFIDAVIT

SEE IDENTICAL EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS DATED SEPT. 18, 1974, pp. 79a-81a OF THIS APPENDIX.

EXHIBIT ANNEXED TO FOREGOING ADDITIONAL AFFIDAVIT

SEE IDENTICAL EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS DATED SEPT. 18, 1974, pp. 81a-82a OF THIS APPENDIX.

ENDORSEMENT AND ORDER OF HON. LLOYD F. MacMAHON DISMISSING ACTION AS TO DEFENDANT FIRST NATIONAL BANK OF BOSTON ON GROUND OF IMPROPER VENUE DATED OCTOBER 21, 1974
(Filed October 22, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

74 Civ. 3025 (LFM)

MacMahon, D.J.:

The within motion, pursuant to Rules 12(b) (2) and (3), Fed. R. Civ. P., for an order dismissing this action as to defendant First National Bank of Boston on the ground of improper venue, is granted.

Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94; *Cope v. Anderson,* 331 U.S. 461, 467 (1947); *Klein v. Bower,*

421 F.2d 338, 342 (2d Cir. 1970); ***Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co.***, 394 F.2d 300 (2d cir.), *cert. denied*, 393 U.S. 855 (1968); ***Buffum v. Chase Nat. Bank of City of N.Y.***, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies Boston as its principal place of business. ***Buffum v. Chase Nat. Bank of City of N.Y., supra***, 192 F.2d at 60; *Leonardi v. Chase Nat. Bank of City of N.Y.*, 81 F.2d 19, 22 (2d cir.), *cert. denied*, 298 U.S. 677 (1936); *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1004 (N.D. Ill. 1973); *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966).

Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.

Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects.

So ordered.

Dated: New York, N.Y.
October 21, 1974

(sgd) Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

NOTICE OF APPEAL
(Filed November 15, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHLAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PLUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Defendants.

S I R S:

PLEASE TAKE NOTICE that plaintiff herein appeals to the United States Court of Appeals for the Second Circuit, located at the United States Courthouse, Foley Square, New York, New York, from each and every part of an Order of the Honorable Lloyd F. MacMahon, United States District Judge,

Notice of Appeal

dated October 21, 1974, granting a motion by defendant First National Bank of Boston for an order dismissing this action as to it on the ground of improper venue.

IRA JAY SANDS

By (Sgd) Ira Sands
Attorney for Plaintiff
Office and Post Office Address
701 Seventh Avenue
New York, New York 10036
(212) 265-3500

AND

SAMUEL GOTTLIEB
GAINSBURG, GOTTLIEB,
LEVITAN & COLE
Co-Counsel for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 697-3440

Dated: New York, New York
November 15, 1974

JUDGMENT OF THE UNITED STATES COURT OF APPEALS
(Filed May 23, 1975)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of May, one thousand nine hundred and seventy-five.

PRESENT:

HON. WILLIAM H. MULLIGAN

HON. MURRAY I. GURFEIN
Circuit Judges

HON. MILTON POLLACK
District Judge

74-2538

Hyman Radzanower,

Plaintiff-Appellant

v.

Judgment of the United States Court of Appeals

Touche Ross & Co., Teleprompter Corporation, Jack K. Cooke, Raymond P. Shafer, W.J. Bresnan, B.P. Simon, J.B. Green, L.H. Read, R.G. Wilson, H.E. Flaherty, B.D. Fischman, Berle Adams, Marvin Caron, R.F. Lewis, P.L. Lowe, Charles Luckman, M.B. Mitchell, A.E. Puckett, J.H. Richardson, M.E. Livingston, Jack Wrather, and First National Bank of Boston,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk